

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

ALCATEL-LUCENT USA INC.,	§	
	§	
PLAINTIFF,	§	
v.	§	CIVIL ACTION NO. 6:09-cv-422 [LED]
	§	
AMAZON.COM, INC.;	§	
ZAPPOS.COM, INC;	§	
NETFLIX, INC.;	§	
OVERSTOCK.COM, INC.;	§	JURY DEMANDED
QVC, INC.;	§	
SEARS HOLDINGS CORPORATION;	§	
SEARS HOLDINGS MANAGEMENT	§	
CORPORATION;	§	
SEARS, ROEBUCK AND CO.;	§	
SEARS BRANDS, LLC;	§	
KMART CORPORATION;	§	
KMART HOLDING CORPORATION;	§	
LANDS' END, INC.;	§	
NEWEGG INC.;	§	
MAGNELL ASSOCIATE INC. d/b/a	§	
NEWEGG.COM; and	§	
INTUIT INC.,	§	
	§	
DEFENDANTS,	§	
	§	
v.	§	
	§	
ENDECA TECHNOLOGIES, INC.,	§	
	§	
THIRD PARTY DEFENDANT.	§	

THIRD PARTY COMPLAINT

Defendants Newegg Inc. and Magnell Associate Inc. d/b/a Newegg.com (collectively, “Newegg”), through their counsel, pursuant to F.R.C.P. 14, assert the following for their Third Party Complaint against Endeca Technologies, Inc. (“Endeca”):

1. Newegg is a corporation existing under the laws of the State of Delaware, having a regular and established place of business at 16839 East Gale Avenue, City of Industry, California 91745. Newegg is the successor-in-interest to Newegg Computers.

2. Endeca is a corporation organized and existing under the law of the State of Delaware, having a regular and established place of business at 101 Main Street, Cambridge, Massachusetts 02142.

3. This court has jurisdiction over this matter under 28 U.S.C. §§ 1331, 1338, and 1367. Venue is proper under 28 U.S.C. §§ 1391 and 1400.

4. Pursuant to an agreement dated June 28, 2005, Newegg Computers licensed the Endeca software from Endeca (the “Agreement”). A true and correct copy of the Agreement is attached as Exhibit A. The Agreement between Newegg and Endeca included an express indemnification provision in section 9.1 whereby Endeca agreed to “indemnify, defend and hold harmless” Newegg “from and against any and all claims, demands, costs, damages, settlements, liabilities, losses, and expenses ... arising out of any third party claim” that the Endeca software “infringe[s] on the Intellectual Property Rights of any third party” The Agreement further provides that it shall be governed by the laws of the Commonwealth of Massachusetts.

5. The software licensed and made available to Newegg by Endeca directs and controls the processing of search terms entered by customers on the Newegg web site, during the term of the Agreement.

6. On November 24, 2009 Alcatel-Lucent USA Inc. (“Alcatel”) filed an Amended Complaint against Newegg in this Court. This Amended Complaint includes counts asserting that Newegg has infringed the claims of United States Patents No. 5,404,507 (Count XXIV).

7. United States Patent No. 5,404,507 and the Endeca software are directed to the processing of search terms entered by Newegg customers, including incomplete or partially incorrect search terms.

COUNT I
BREACH OF CONTRACT

8. Newegg repeats and reavers each and every averment contained in paragraphs 1-7 of its Third Party Complaint as if set forth in their entirety.

9. By means of the Agreement, Endeca expressly represented and warranted to Newegg that the Endeca software could be used free and clear of any third party claim of infringement.

10. Based upon the allegations in Alcatel's complaint, if proven, Endeca has breached its Agreement with Newegg. Endeca is responsible for all damages, costs, and legal fees incurred by Newegg in connection with this dispute in relation to United States Patent No. 5,404,507.

COUNT II
BREACH OF WARRANTY UNDER MASS. GEN. LAWS ch. 106, § 2312

11. Newegg repeats and reavers each and every averment contained in paragraphs 1-10 of its Third Party Complaint as if set forth in their entirety.

12. The software licensed by Endeca to Newegg are "goods" as defined by the California Commercial Code. Endeca is a seller of such goods in commerce.

13. Massachusetts General Laws ch. 106, § 2-312 provides that the seller of goods in commerce warrants that such goods do not infringe upon the intellectual property rights of third parties. This warranty was not disclaimed, and Newegg did not supply Endeca with

specifications that caused the Endeca software to potentially infringe United States Patent No. 5,404,507.

14. Based upon the allegations in Alcatel's Amended Complaint if proven, Endeca has breached this warranty as it relates to United States Patent No. 5,404,507.

15. Newegg is potentially subject to damages due to Endeca's breach and has paid, and continues to pay, legal fees and costs in connection with its defense.

16. Pursuant to Massachusetts General Laws ch. 106, § 2-312, Endeca is responsible for all damages, costs and legal fees incurred by Newegg in connection with this matter.

COUNT III
COMMON LAW INDEMNITY

17. Newegg repeats and reavers each and every averment contained in paragraphs 1-16 of its Third Party Complaint as if set forth in their entirety.

18. Based upon the foregoing, Endeca has a common law duty to fully indemnify Newegg against all damages, costs, and legal fees incurred by Newegg in connection with the Amended Complaint filed against Newegg by Alcatel as it relates to United States Patent No. 5,404,507.

WHEREFORE, Newegg prays that Endeca be ordered to pay to Newegg an amount equal to: (a) any damage award which is held to be owed to Alcatel by Newegg in this action for the infringement of United States Patent No. 5,404,507; plus (b) all costs and attorney's fees incurred by Newegg in defending this action for the infringement of United States Patent No. 5,404,507; and that Newegg be awarded such other and further relief as this Court deems just and equitable.

Dated: June 2, 2010

By: /s/ Kent E. Baldauf, Jr. with permission
by Trey Yarbrough
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Magnell Associate Inc.

Certificate of Service

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 2nd day of June, 2010. All other counsel not deemed to have consented to service in such manner will be served via facsimile transmission and/or first class mail.

/s/ Trey Yarbrough
Trey Yarbrough